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No. 90-636

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In the Supreme Court of the United States

OCTOBER TERM, 1990

PETER MALCOLM DAVIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the United States lacked jurisdiction over petitioner's British-registered vessel on the high seas.

2. Whether the Coast Guard's boarding and search of petitioner's vessel was conducted without statutory authority and in violation of the Fourth Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A19-A31) is reported at 905 F.2d 245. The opinion of the district court (Pet. App. A1-A18) is reported at 678 F. Supp. 1437.

JURISDICTION

The judgment of the court of appeals was entered on May 21, 1990. The petition for rehearing was denied on July 6, 1990 (Pet. App. A32). The petition for a writ of certiorari was filed on October 4, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a bench trial on stipulated facts in the United States District Court for the Northern District of California, petitioner was convicted of two violations of the Maritime Drug Law Enforcement Act, 46 U.S.C. App. 1901 *et seq.*: possessing marijuana on a vessel subject to the jurisdiction of the United States with intent to distribute it, in violation of 46 U.S.C. App. 1903(a); and conspiring to commit that offense, in violation of 46 U.S.C. App. 1903(j). He was sentenced to ten years' imprisonment, to be followed by a four-year term of supervised release. The court of appeals affirmed. Pet. App. A19-A31.

1. On June 15, 1987, the Coast Guard cutter CAPE ROMAIN encountered the MYTH OF ECURIE, a sailing vessel about 58 feet long, approximately 35 miles southwest of Point Reyes, California. Pet. App. A2, A22. When first sighted, the MYTH was headed for San Francisco. *Ibid.* Coast Guard personnel aboard the CAPE ROMAIN radioed a request to the MYTH for permission to board it. *Ibid.* Petitioner, the captain of the MYTH, denied the request, claiming that the Coast Guard lacked jurisdiction over the vessel because it was of British registry and had departed from Hong Kong. *Ibid.* Petitioner also said that, although the MYTH had been bound for San Francisco, he was changing its destination and sailing instead to the Caribbean. *Id.* at A2, A17, A22, A26.

The Coast Guard officers suspected the MYTH of smuggling illegal drugs. Pet. App. A22. The basis for the officers' suspicion was that: (1) the MYTH was included on a list of vessels suspected of drug trafficking maintained by the Drug Enforcement Administration's El Paso Intelligence Center; (2) the MYTH was sighted in an area where sailing vessels of that size were seldom seen; (3) the

MYTH's purported point of departure was an unusual one for sailing vessels; (4) the bow of the MYTH was riding very low in the water, indicating that cargo was on board; and (5) the MYTH altered its course after it encountered the Coast Guard. *Id.* at A17, A22, A26-A27; Supp. E. R. 20.

Based on these observations, the Coast Guard requested permission from the government of the United Kingdom to board the MYTH. Pet. App. A2-A3, A22. The Coast Guard told British officials why it believed the MYTH was smuggling drugs. *Id.* at A22. In a teletype reply, the United Kingdom authorized the Coast Guard to board, search, and seize the MYTH in accordance with the procedures set forth in the Agreement on Narcotic Drugs; Interdiction of Vessels, Nov. 13, 1981, United States-Great Britain, 33 U.S.T. 4225, T.I.A.S. No. 10296. Pet. App. A3, A22, A28.

On June 16, 1987, Coast Guard officers from the CAPE ROMAIN boarded the MYTH, which was by then approximately 100 miles west of the California coast. Pet. App. A3. Upon boarding, the officer smelled marijuana in the MYTH's cabin. *Id.* at A17. Petitioner told the boarding officers that he kept a shotgun below deck. *Id.* at A3. When one of the boarding officers accompanied petitioner below to get the weapon, the officer saw numerous bales of material and noticed a heavy smell of marijuna. *Id.* at A3, A23. Petitioner admitted that the bales contained marijuana. *Id.* at A3. The Coast Guard officers then arrested petitioner and his crew and took the MYTH to the Coast Guard station in San Francisco, where a search of the vessel yielded 7,000 pounds of marijuana. *Ibid.*

2. Petitioner moved to dismiss the indictment for lack of jurisdiction and to suppress the evidence seized from the MYTH. The district court denied both motions. Pet. App. A1-A18.

3. The court of appeals upheld both rulings and affirmed petitioner's convictions. Pet. App. A19-A31.

The court rejected petitioner's contention that the United States could not assert jurisdiction over the MYTH because it was a foreign vessel on the high seas. Pet. App. A23-A27. The court determined that Congress could proscribe criminal conduct on the high seas by virtue of its constitutional power to "define and punish piracies and felonies on the high seas." *Id.* at A24 (quoting U.S. Const. Art. I, § 8, Cl. 10). The court further determined that Congress had exercised that power in the Maritime Drug Law Enforcement Act, which expressly applies to vessels "outside the territorial jurisdiction of the United States." Pet. App. A25 (quoting 46 U.S.C. App. 1903(h)). Finally, the court determined that application of the Act in this case comported with due process. Pet. App. A25-A26. The undisputed evidence indicated that petitioner "intended to smuggle contraband into United States territory." *Id.* at A26. That conduct established a sufficient nexus between petitioner and the United States such that application of the Act to petitioner "would not be arbitrary or fundamentally unfair." *Id.* at A25-A26 (citing *United States* v. *Peterson*, 812 F.2d 486, 493 (9th Cir. 1987)).

The court further held that the Act authorized the assertion of jurisdiction in this case. The court observed that the Act applies to vessels "located within the customs waters of the United States" (Pet. App. A27 (quoting 46 U.S.C. App. 1903(c)(1)(D)), and that "customs waters" exist when there is an "arrangement" between the United States and the flag country authorizing the United States "to board, examine, search, seize, or otherwise to enforce upon such vessel upon the high seas the laws of the United States" (Pet. App. A27 (quoting 19 U.S.C. 1401(j)). The court determined that such an arrangement was made in

this case: "[T]he [Coast Guard's] request for permission to board and the United Kingdom's reply telex constitute[d] an arrangement pursuant to section 1401(j)." Pet. App. A29.

The court rejected petitioner's argument that the Coast Guard lacked authority to conduct the boarding and search of the MYTH and that its actions violated the Fourth Amendment. The court held that the Coast Guard had statutory authority for these actions under 14 U.S.C. 89(a), which permits the Coast Guard to board, search, and seize any vessel "upon the high seas and waters over which the United States has jurisdiction." Pet. App. A30. The United States had jurisdiction over the MYTH, the court determined, by virtue of the arrangement between the United States and the United Kingdom. *Ibid.* The court further held that petitioner lacked standing to invoke the Fourth Amendment because, under *United States* v. *Verdugo-Urquidez*, 110 S. Ct. 1056 (1990), the Fourth Amendment does not apply to searches of nonresident aliens on the high seas. Pet. App. A30-A31.

ARGUMENT

1. Petitioner renews his contention (Pet. 7-12) that the United States lacked jurisdiction over the MYTH. The courts below properly rejected that contention.

Under the Maritime Drug Law Enforcement Act, the United States may assert jurisdiction over a foreign vessel on the high seas under either of two circumstances: when "the flag nation has consented or waived objection to enforcement of United States law by the United States"; or when the "vessel [is] located within the customs waters of the United States." 46 U.S.C. App. 1903(c)(1)(C) and (D). "[C]ustoms waters" include waters in which, by treaty or "other arrangement" with the flag nation, United States

authorities are permitted to exercise jurisdiction and enforce United States laws. 19 U.S.C. 1401(j).

Both of these circumstances obtained here. The United Kingdom expressly consented to the Coast Guard's boarding, search, and seizure of the MYTH. Pet. App. A3, A22, A41-A42. That action constituted both a waiver of objection to the United States' assertion of jurisdiction under 46 U.S.C. App. 1903(c)(1)(C) and an "arrangement" between the United Kingdom and the United States under 19 U.S.C. 1401(j). The court of appeals therefore correctly held (Pet. App. A27-A29) that the Act authorized the United States to assert jurisdiction over the MYTH.

Petitioner argues (Pet. 9-10) that the assertion of jurisdiction over the MYTH was invalid because the Coast Guard did not comply with the 1981 Agreement between the United States and the United Kingdom. Although the 1981 Agreement does not apply by its own force to interdictions in the Pacific Ocean (Pet. App. A40), the United Kingdom specified, when it consented to the boarding, search, and seizure of the MYTH in this case, that "the terms contained in 13 Nov 1981 Agreement will be used * * *." *Id.* at A41.

In pertinent part, the 1981 Agreement, 33 U.S.T. 4225-4226, provides as follows[1]:

> 1. The Government of the United Kingdom of Great Britain and Northern Ireland agree that they will not object to the boarding by the authorities of the United States, outside the limits of the territorial sea and contiguous zone of the United States and within the area described in paragraph 9 below, of private vessels under the British flag in any case in which those authorities reasonably believe that the

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[1] The Agreement is reproduced in its entirety at Pet. App. A38-A40.

vessel has on board a cargo of drugs for importation into the United States in violation of the laws of the United States.

2. On boarding the vessel the authorities of the United States may address enquiries to those on board, examine the ship's papers and take such other measures as are necessary to establish the place of registration of the vessel. When these measures suggest that an offence against the laws of the United States relative to the importation of narcotic drugs is being committed, the Government of the United Kingdom agree that they will not object to the authorities of the United States instituting a search of the vessel.

3. If the authorities of the United States then believe that an offence against the laws referred to in paragraph 2 above is being committed, the Government of the United Kingdom agree that they will not object to the vessel being seized and taken into a United States port.

4. The Government of the United Kingdom may, within 14 days of the vessel's entry into port, object to the continued exercise of United States jurisdiction over the vessel for purposes of the laws referred to in paragraph 2 above, and the Government of the United States shall thereupon release the vessel without charge. The Government of the United States shall not institute forfeiture proceedings before the end of the period allowed for objections.

5. The Government of the United Kingdom may, within 30 days of the vessel's entry into port, object to the prosecution of any United Kingdom national found on board the vessel, and the Government of the United States shall thereupon release such person.

> The Government of the United Kingdom agree that they will not otherwise object to the prosecution of any person found on board the vessel.

As an initial matter, petitioner lacks standing to invoke the 1981 Agreement. It is well settled that an individual has no standing to allege a violation of an international agreement unless the agreement expressly provides otherwise. *United States* v. *Bent-Santana*, 774 F.2d 1545, 1550 (11th Cir. 1985). Nothing in the 1981 Agreement confers any private rights or affirmative defenses on individuals. On the contrary, Paragraphs 3, 4, and 5 of the Agreement give the right to object to an assertion of jurisdiction by the United States exclusively to the government of the United Kingdom. Moreover, Section 1903(d) of the Act explicitly provides that "[a] claim of failure to comply with international law in the enforcement of this chapter may be invoked solely by a foreign nation, and a failure to comply with international law shall not divest a court of jurisdiction or otherwise constitute a defense to any proceeding under this chapter." Pet. App. A39. Both the Act and the Agreement thus clearly preclude the arguments that petitioner seeks to present.

In any event, petitioner's arguments based on the 1981 Agreement are without merit. The Coast Guard fully complied with the Agreement in this case.

Petitioner argues (Pet. 10), first, that under Paragraph 1 of the Agreement the Coast Guard lacked reasonable suspicion to believe that the MYTH was smuggling illegal drugs. The courts below correctly rejected that argument. Upon encountering the MYTH, the Coast Guard determined that it was on the DEA's list of vessels suspected of drug trafficking. Pet. App. A22; Supp. E.R. 20, 22. In addition, the MYTH was found in an unusual location and reported an unusual point of departure for a vessel of its type; its bow was riding very low in the water, indicating

that it was carrying cargo; and it altered its course after it encountered the Coast Guard. Pet. App. A17, A22, A26-A27. As the court of appeals held, these factors "could reasonably lead a Coast Guard officer to believe the MYTH was smuggling contraband." *Id.* at A29.

Contrary to petitioner's assertion (Pet. 9), the Coast Guard was not required under Paragraph 1 to communicate the basis for its reasonable suspicion to the United Kingdom. Paragraph 1 authorizes United States authorities to board a British vessel when "those authorities" believe the vessel is importing drugs. Pet. App. A38. Paragraph 1 thus gives United States authorities sole responsibility for determining reasonable suspicion. Indeed, far from requiring the authorities in each case to convey the basis for their reasonable suspicion, Paragraph 1 does not even obligate the authorities to obtain consent in each case. The terms of Paragraph 1 are prospective; the provision itself constitutes consent. In any event, before boarding the MYTH, the Coast Guard officers told British officials why they suspected the vessel was smuggling contraband. Pet. App. A22; Supp. E.R. 20, 22. The factual premise for petitioner's argument is thus incorrect.

Petitioner is also incorrect in arguing (Pet. 9) that Paragraph 2 of the Agreement authorizes the boarding of a vessel only if necessary to determine the vessel's registry, and that the boarding in this case was improper because the MYTH's registry was confirmed prior to boarding. Although the Coast Guard determined the MYTH's registry before boarding it, the Coast Guard could not be certain of the vessel's identity until documentation on board the vessel was checked against its main beam number. Supp. E.R. 11. That is precisely what the Coast Guard officers did after boarding the MYTH. *Ibid.* The British government evidently does not share petitioner's

interpretation of the Agreement, since it consented to the boarding of the MYTH *after* confirming for the Coast Guard that the MYTH was registered in the United Kingdom. Pet. App. A38.

Petitioner is also incorrect in arguing (Pet. 9-10) that the 1981 Agreement required the Coast Guard after boarding the MYTH to contact the United Kingdom a second time to obtain its consent to search the vessel, and a third time to obtain its consent to arrest petitioner and seize the vessel. The government of the United Kingdom consented to the boarding, the search, and the enforcement of United States law with regard to the MYTH in a single transmittal.

The 1981 Agreement did not require that the Coast Guard contact British officials on three separate occasions. Under Paragraph 7 of the Agreement, United States authorities who have boarded a British vessel are required only to "promptly inform the authorities of the United Kingdom of the action taken" and to "keep them fully informed of any subsequent developments." Pet. App. A39. Paragraph 4 of the Agreement gives the United Kingdom 14 days *after* the entry of the vessel into port to object to its seizure, and Paragraph 5 gives it 30 days *after* that date to object to the prosecution of any British national found on the vessel. *Ibid.* Thus, the Agreement treats the search of a vessel and the enforcement of United States law with regard to the vessel like the boarding of the vessel: The Agreement provides consent to these actions prospectively, and it gives United States authorities sole discretion to take those actions, subject to later objection by the United Kingdom.

2. Petitioner further contends (Pet. 5-7) that the Coast Guard lacked authority to board and search the MYTH and that it took those actions in violation of the Fourth Amendment.

The court of appeals correctly held (Pet. App. A30) that the Coast Guard acted within its authority under 14 U.S.C. 89(a). That provision authorizes the Coast Guard to "go on board of any vessel subject to the jurisdiction, or to the operation of any law, of the United States, address inquiries to those on board, examine the ship's documents and papers, and examine, inspect and search the vessel and use all necessary force to compel compliance." As shown above, the MYTH was subject to the jurisdiction of the United States because it was within the "customs waters" of the United States.[2] Petitioner's challenge to the Coast Guard's authority is therefore without merit.

Likewise without merit is petitioner's Fourth Amendment challenge.[3] As numerous courts have held, government officers acting within their statutory authority may,

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[2] The boarding and search were also authorized by 19 U.S.C. 1581(a), which permits "officers of the customs" to board any vessel within the customs waters for the purpose of conducting a search. Under 19 U.S.C. 1401(j), as we have shown, the United Kingdom's consent to the boarding created customs waters around the MYTH. And, under 19 U.S.C. 1401(i), Coast Guard officers qualify as "officers of the customs." See *United States* v. *Reeh*, 780 F.2d 1541, 1546 (11th Cir. 1986).

[3] In rejecting petitioner's Fourth Amendment claim, the court of appeals relied on *United States* v. *Verdugo-Urquidez*, 110 S. Ct. 1056 (1990). Pet. App. A30-A31. In *Verdugo-Urquidez*, this Court held that the Fourth Amendment does not apply to searches and seizures of the property of nonresident aliens in a foreign country. *Id.* at 1059. The court of appeals concluded that "the analysis and language adopted by the Court creates no exception for searches of nonresident aliens on the high seas." Pet. App. A31. In his petition for rehearing and again here (Pet. 5 & n.1), petitioner claims that he was a resident alien. Although the record on appeal establishes that petitioner is not a United States citizen, it does not indicate his resident status. Even if the holding of *Verdugo-Urquidez* is inapposite, however, petitioner's Fourth Amendment claim is without merit.

consistent with the Fourth Amendment, board a vessel on the high seas if they reasonably suspect that it is engaged in criminal activity. *United States* v. *Wright-Barker*, 784 F.2d 161, 176 (3d Cir. 1986); *United States* v. *Reeh*, 780 F.2d 1541, 1546-1547 (11th Cir. 1986); *United States* v. *Green*, 671 F.2d 46, 53 (1st Cir.), cert. denied, 457 U.S. 1135 (1982); *United States* v. *Streifel*, 665 F.2d 414, 422-423 (2d Cir. 1981); *United States* v. *Williams*, 617 F.2d 1063, 1076, 1084 (5th Cir. 1980) (en banc). As the courts below held, the Coast Guard officers had reasonable grounds to believe that the MYTH was carrying drugs for importation into the United States and were therefore entitled to board it. After boarding the MYTH, the officers were entitled to go below deck, where the marijuana was found, based on the odor of marijuana that they noticed upon boarding the vessel and the need to retrieve the firearm that petitioner stated he kept here. See *United States* v. *Humphrey*, 759 F.2d 743, 748 (9th Cir. 1985), cert. denied, 480 U.S. 917 (1987).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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